

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

FILED BY CLERK

MAR 10 2008

COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,

Appellee,

v.

RAFAEL MARISCAL CARDENAS,

Appellant.

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) 2 CA-CR 2007-0187
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) DEPARTMENT B
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MEMORANDUM DECISION

Not for Publication

Rule 111, Rules of
the Supreme Court
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APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20064242

Honorable John S. Leonardo, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Randall M. Howe and William S. Simon

Phoenix
Attorneys for Appellee

Robert J. Hooker, Pima County Public Defender
By Rose Weston

Tucson
Attorneys for Appellant

V Á S Q U E Z, Judge.

¶1 Following a jury trial, appellant Rafael Mariscal Cardenas was convicted of second-degree burglary and theft by control of property worth \$4,000 or more. After finding he had two historical prior felony convictions and had committed the present offenses while on release from confinement, the trial court sentenced him to two concurrent, enhanced, presumptive prison terms of 11.25 years. On appeal, Cardenas argues the court erred in finding he was on release within the meaning of A.R.S. § 13-604.02 and, therefore, should not have imposed enhanced sentences under the statute. He also argues the trial court should have granted his motion for new trial based on the court's admission of evidence it had previously precluded. For the reasons discussed below, we affirm.

Facts and Procedural Background

¶2 We view the evidence presented in the light most favorable to sustaining the convictions. *State v. Cropper*, 205 Ariz. 181, ¶ 2, 68 P.3d 407, 408, *supp. op.*, 206 Ariz. 153, 76 P.3d 424 (2003). On the afternoon of November 3, 2006, L.H. was at home with her two-year-old daughter when she heard a noise in the backyard. She went to the kitchen to investigate and saw a man trying to open the locked kitchen patio door. She then watched as he walked past the kitchen window and heard him try the handle of another locked door. She noticed the man was wearing blue gloves, which she later identified as the gardening gloves she had left on a table outside. When L.H. heard him break a bedroom window, she fled with her daughter and called 911 from her cordless telephone.

¶3 A few minutes later, as two officers from the Tucson Police Department arrived at the residence, one of them saw Cardenas running away from the house, still wearing the blue gloves. The officer gave chase and repeatedly shouted at him to stop. Cardenas eventually stopped and was taken into custody. The officer handcuffed him and, while searching him for weapons, noticed a piece of jewelry hanging from one of his pockets. The officer removed the jewelry and other contents of Cardenas's pockets and placed the items on the trunk of his patrol car, and L.H. identified the jewelry as hers. The items were later photographed by a police technician. After being read his *Miranda*¹ rights, Cardenas admitted breaking into the house and stealing the jewelry.

Discussion

¶4 Cardenas first argues the trial court erred by enhancing his sentences under § 13-604.02. He contends there was insufficient evidence to “establish that [he] had been on release at the time of the crimes” because his parole officer testified Cardenas was on “unsupervised parole,” a status not found in the statute. At trial, Cardenas similarly argued that “the statute dealing with committing a felony on release d[id]n’t apply to [him]” because his status “wasn’t the type that was contemplated under [§]13-604.02.” However, he conceded below that he was unable to cite any case law in support of this position, and he offers no such authority on appeal.

¹*Miranda v. Arizona*, 384 U.S. 436 (1966).

¶5 “We review a trial court’s sentencing decision for an abuse of discretion.” *State v. Rodriguez*, 200 Ariz. 105, ¶ 3, 23 P.3d 100, 101 (App. 2001). We will find an abuse of discretion “when the court fails to conduct an adequate investigation into the facts relevant to imposing sentence.” *Id.* Additionally, “[t]he interpretation and application of a statute is a question of law subject to this court’s de novo review.” *Nordstrom v. Cruikshank*, 213 Ariz. 434, ¶ 9, 142 P.3d 1247, 1251 (App. 2006).

¶6 Section 13-604.02(B) provides:

[A] person convicted of any felony offense . . . committed while the person is on probation for a conviction of a felony offense or *parole*, work furlough, community supervision or *any other release* or escape from confinement for conviction of a felony offense shall be sentenced to a term of not less than the presumptive sentence authorized for the offense.

(Emphasis added.) “We will refrain from construing a statute to require something not within the plain intent of the legislature as expressed by the language of the statute.” *State v. Affordable Bail Bonds*, 198 Ariz. 34, ¶ 13, 6 P.3d 339, 342 (App. 2000).

¶7 Irrespective of how the parole officer described or characterized Cardenas’s release status, “[t]he sentencing statute only requires that [a] defendant be on some form of early release.” *State v. Hudson*, 158 Ariz. 455, 457, 763 P.2d 519, 521 (1988); *see State v. Bruggeman*, 161 Ariz. 508, 511, 779 P.2d 823, 826 (App. 1989) (finding no error where trial court misstated type of release status). Thus, proof that Cardenas was on any form of early release from confinement would be sufficient to satisfy § 13-604.02(B). Parole of any kind, whether supervised or not, is a form of early release.

¶8 In a similar vein, Cardenas argues that, because the parole officer was also “unclear in her answers and uncertain of the time frames for [his] prior incarceration and release,” there was insufficient evidence for the trial court to find Cardenas had been on any form of release when he committed the theft on November 3, 2006. But, in determining for sentencing purposes whether § 13-604.02 applies, a trial judge “may consider all evidence and information presented at all stages of the trial together with all probation and presentence reports.”” *State v. Turner*, 141 Ariz. 470, 475, 687 P.2d 1225, 1230 (1984), quoting *State v. Meador*, 132 Ariz. 343, 346, 645 P.2d 1257, 1260 (App. 1982); see also *Bruggeman*, 161 Ariz. at 511, 779 P.2d at 826.

¶9 Contrary to Cardenas’s contention that the parole officer’s testimony “was the only evidence of [his] on-release status,” the court also admitted certified copies of Cardenas’s two prior felony convictions, in CR-38022 and CR-37208, and of his Arizona Department of Corrections (DOC) master records file. The prior convictions records showed Cardenas had been sentenced to concurrent terms of fifteen years’ imprisonment, dating from July 22, 1992, with credit for 159 days served prior to sentencing. The DOC file similarly showed his sentence was not due to expire until February 13, 2007, as did Cardenas’s presentence report. This evidence was sufficient to prove the present offenses were committed while Cardenas was on release. *State v. Avila*, 147 Ariz. 330, 338-39, 710 P.2d 440, 448-49 (1985) (“documents . . . from the Department of Corrections’ file on the defendant” sufficient to prove crime committed while defendant on release status).

¶10 Furthermore, although we agree the parole officer’s testimony was at times unclear, she unequivocally stated that Cardenas’s “parole was to expire in either January or February of 07,” and she responded affirmatively when the court asked if Cardenas was on parole on November 3, 2006. The trial court was in the best position to evaluate her testimony and resolve any inconsistencies that may have existed. *See State v. Gilfillan*, 196 Ariz. 396, ¶ 33, 998 P.2d 1069, 1078 (App. 2000). In short, we find substantial evidence exists to support the court’s finding that Cardenas was on release from confinement for a previous felony conviction when he committed the instant offenses. *See* § 13-604.02.

¶11 Cardenas next argues the court erred in denying his motion for a new trial. That motion was based on the erroneous admission of evidence the court had previously precluded. Before trial, the court had granted Cardenas’s motion in limine to preclude any mention of a knife found in his pocket when he was searched incident to arrest. The prosecutor acknowledged she needed to check the photographs she intended to introduce into evidence to ensure the knife was not shown. But at trial, the court admitted one such photograph—showing the stolen jewelry arrayed on the trunk of the police car—in which both the knife and a syringe that had also been found on Cardenas were visible.² Neither Cardenas nor the state noticed those items in the photograph until after the jury had

²Apparently, both Cardenas and the state assume the court had also precluded mention of the syringe as Cardenas requested in his motion in limine. Although we can find nothing in the record to support this assumption, we find the admission of the photograph depicting the syringe to be harmless error, under the same reasoning we employ for the knife.

rendered its verdict. When a juror subsequently mentioned a knife during an informal post-trial discussion with the attorneys, Cardenas's counsel was alerted to the error and subsequently filed a motion for a new trial, which the court denied.

¶12 We review a trial court's denial of a motion for new trial for an abuse of discretion. *State v. Hoskins*, 199 Ariz. 127, ¶ 52, 14 P.3d 997, 1012 (2000), *supp. op.*, 204 Ariz. 572, 65 P.3d 953 (2003). Because the court erroneously, albeit inadvertently, admitted the evidence and Cardenas's motion in limine was sufficient to preserve his objection on appeal, we review for harmless error.³ *State v. Burton*, 144 Ariz. 248, 250, 697 P.2d 331, 333 (1985). We will only find erroneously admitted evidence harmless in a criminal case when we are satisfied beyond a reasonable doubt that the error did not affect the verdict. *State v. Bass*, 198 Ariz. 571, ¶ 39, 12 P.3d 796, 805-06 (2000); *see State v. Fulminante*, 193 Ariz. 485, ¶ 49, 975 P.2d 75, 90 (1999).

¶13 In *State v. Doerr*, 193 Ariz. 56, ¶¶ 31-33, 969 P.2d 1168, 1176 (1998), our supreme court addressed a similar issue and found the admission of an "in life" photograph of a murder victim to be harmless error. Although the court recognized that such a photograph might generate sympathy for the victim and thus "undermin[e] the defendant's right to an objective determination of guilt or innocence," it determined the photograph had

³The state cites *State v. Lichon*, 163 Ariz. 186, 189, 786 P.2d 1037, 1040 (App. 1989), for the proposition that an objection raised in limine must be renewed at trial to be preserved on appeal. However, *Lichon* acknowledges that its conclusion is an exception to the general rule. Absent any of the particular circumstances present in *Lichon*, we apply the general rule here.

not caused any such damage to occur. *Id.* ¶ 32. It concluded that, “[g]iven the overwhelming physical evidence introduced at trial,” the photograph “did not materially affect the outcome of the case.” *Id.* ¶ 33.

¶14 Here, as the trial court correctly noted, “[T]he fact that there was a pocket knife and syringe among the things disclosed on the trunk of the squad car [was] of . . . little prejudicial damage to the defendant, as neither w[as] related to the circumstances of the crime.” And, as the court also concluded, we agree there was “[o]verwhelming evidence of guilt on [Cardenas]’s part.” Cardenas confessed to the offense and was arrested with the jewelry in his pocket.

¶15 Additionally, Cardenas does not suggest that the state deliberately violated the court’s order excluding evidence of the knife. *See State v. Corrales*, 138 Ariz. 583, 595, 676 P.2d 615, 627 (1983) (appellate court reluctant to find error harmless where prosecutor acted intentionally). Indeed, he acknowledges that neither defense counsel nor the prosecutor was aware of the offending photograph until one of the jurors mentioned it in conversation after the trial had concluded. Thus, Cardenas does not argue, nor could he reasonably claim, that the photographic evidence of the pocket knife and syringe was emphasized during trial or relied upon by the prosecutor in closing argument. *Cf. State v. Wood*, 180 Ariz. 53, 64, 881 P.2d 1158, 1169 (1994) (in determining if error harmless, trial court considers fact that prosecutor neither emphasized evidence nor mentioned it in closing).

¶16 We are therefore satisfied that the admission of the photograph did not affect the jury’s verdict, and the error was thus harmless. *See Hoskins*, 199 Ariz. 127, ¶¶ 57-58, 14 P.3d at 1012-13 (no reasonable probability verdict affected by erroneously admitted evidence when record contained strong circumstantial evidence of guilt); *see also State v. Spreitz*, 190 Ariz. 129, 142, 945 P.2d 1260, 1273 (1997) (erroneous admission of gruesome autopsy photos harmless given overwhelming evidence of defendant’s guilt, “including, most importantly, his own uncoerced confession”); *State v. Bible*, 175 Ariz. 549, 588, 858 P.2d 1152, 1191 (1993) (when other evidence unequivocally established guilt, erroneous admission of DNA evidence harmless). The court did not abuse its discretion in denying Cardenas’s motion for a new trial.

Disposition

¶17 For the reasons stated above, we affirm.

GARYE L. VÁSQUEZ, Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

PHILIP G. ESPINOSA, Judge